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SUPREME COURT, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMPUTER HEAVEN, INC.,

and

ROBERT W. DERVISHIAN,

Petitioners

versus

CRESTAR BANK, Successor in interest to United Virginia Bank

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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I. DID THE COURT'S SUSTAINING OF THE PLAINTIFF'S DEMURRER, CONSTITUTE REVERSIBLE ERROR AND PREJUDICE THE RIGHTS OF THE DEFENDANTS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. DID THE COURT'S SUSTAINING THE PLAINTIFF'S PLEA OF THE STATUTE OF LIMITATIONS AND LACHES, CONSTITUTE REVERSIBLE ERROR AND PREJUDICE THE RIGHTS OF THE DEFENDANTS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

III. DID THE COURT'S GRANTING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND DISMISSING THE DEFENDANTS' EQUITABLE DEFENSE OF FRAUD AND COUNTERCLAIMS,

CONSTITUTE REVERSIBLE ERROR AND PREJUDICE THE RIGHTS OF THE DEFENDANTS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMPUTER HEAVEN, INC.,
and
ROBERT W. DERVISHIAN, Petitioners

v.

CRESTAR BANK, Successor in interest
to United Virginia Bank, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Your Petitioners, Computer Heaven, Inc. and Robert W. Dervishian, respectfully pray that a Writ of Certiorari issue on a direct appeal from the judgement of the Supreme Court of Virginia affirming an Order entered by the Circuit Court of the City of Richmond, Virginia, which dismissed your Petitioners Equitable Defenses and Counterclaims.

The names of all parties appear in the caption of this case. Computer Heaven, Inc. and Robert W. Dervishian will be hereinafter referred to as Petitioners, Appellants, Defendants, Computer Heaven, or Dervishian. Crestar Bank will be hereinafter referred to as Respondent, Appellee, Plaintiff, Bank or Crestar.

OPINIONS DELIVERED

The order and letter opinion of the Circuit Court of the City of Richmond, Virginia dismissing your Petitioners Equitable Defenses of Fraud and Counterclaims are unpublished. [Letter Opinion, February 12, 1992, Appendix p. 1; Order, Appendix p. 5].

The order of the Supreme Court of Virginia denying Petitioners' timely Petition for Writ of Error and Supersedeas is unpublished. [August 4th, 1992, Appendix p. 9] The order opinion of the Supreme Court of Virginia denying Petitioners' timely Petition for Rehearing is unpublished. [September 18, 1992, Appendix, p. 10]. The order of the Supreme Court of Virginia granting your

Petitioners' Motion for Deferral of Issuance of Mandate is unpublished. [October 22, 1992, Appendix, p. 11]

STATEMENT OF JURISDICTION

The judgement of the Supreme Court of Virginia was entered on August 4, 1992, denying your Petitioners' timely Petition for Writ of Error and Supersedeas [Appendix, p. 9]; and the Supreme Court of Virginia entered its Order on September 18, 1992 denying your Petitioners' timely Petition for Rehearing [Appendix, p. 10], thereby affirming the Final Order entered by the Circuit Court of the City of Richmond, Virginia on February 12, 1992, dismissing your Petitioners Equitable Defenses of Fraud and Counterclaims against the Plaintiff [Appendix, p. 5]. The Supreme Court of Virginia granted your Petitioners' Motion for Deferral of Issuance of Mandate on October 22, 1992 [Appendix, p. 11]. Your Petitioners invoke the jurisdiction of the United States Supreme Court pursuant to United States Code, Title 28, Section 1257(3)

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 11 of the Virginia Constitution provides, in pertinent part:

"That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law imparing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national orgin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five."

STATEMENT OF THE CASE

Your Petitioners, Computer Heaven, Inc. and Robert W. Dervishian, are aggrieved and appeal from a Final Order entered by the Circuit Court of the City of Richmond, Virginia on February 12, 1992, dismissing your Petitioners' Equitable Defense of Fraud and their separate equitable Counterclaims against Crestar Bank; which was affirmed by the Supreme Court of Virginia on September 18, 1992 [Appendix p. 10].

Simply stated, in 1983, Crestar Bank made a commitment to fund your Petitioners proposed computer businesses, when in fact, Crestar Bank never had any intention to perform pursuant to the terms of it's "commitment" to your Petitioners.

Crestar Bank concealed this truth from your Petitioners by all manner of misrepresentations, manipulations, harassment, and deceit, from March, 1983 until your Petitioners discovered the fraud in October, 1989, when Crestar Bank made call on a $14,500.00 Demand Note dated March 9,

1987. The Demand Note evidences the said "commitment" and continuing transaction which is the subject matter of your Petitioners' Equitable Defenses of Fraud and their separate equitable Counterclaims against Crestar Bank.

During Discovery, your Petitioners factually proved their Equitable Defense of Fraud, as well as, their separate Counterclaims by documents which were produced by Crestar Bank and oral depositions given by Officers of Crestar Bank.

The Circuit Court (trial court) took no evidence by way of Testimony of any witness on any issue, refused to consider any Discovery (deposition or document produced), and based it's letter opinion and Order of February 12, 1992 upon the pleadings [Hearing 3/3/92, p. 10 to 11],

The Admissions of the Parties were not considered by the Circuit Court on any Pleas or Motion. When the Circuit Court ruled on Plaintiff's Plea to the Statute of Limitations/Doctrine of Laches and Motion

for Summary Judgement, it did not take any testimony, and only considered the facts setforth in the Pleadings filed by the parties.

On January 4, 1990, the Plaintiff, Crestar Bank, filed it's Motion for Judgement against the Defendants, Computer Heaven, Inc. and Robert W. Dervishian as guarantor, in the Circuit Court of the City of Richmond, Virginia, upon a $14,500.00 demand note dated March 9, 1987, claiming a balance of $13,375.21. On February 6, 1990, Defendants (your Petitioners) filed their Special Plea of the Equitable Defense of Fraud pursuant to Virginia Code 8.01-422, their Counterclaims, and separate Grounds of Defense.

On February 12, 1992, the Circuit Court of the City of Richmond, Virginia entered it's Order dismissing Defendant's Equitable Defense of Fraud and Defendants' Counterclaims.

On September 18, 1992 the Supreme Court of Virginia denied Appellants Petition for Rehearing. [See, Virginia Petition for Writ of Error and Supersedeas, FACTS.]

RAISING FEDERAL QUESTIONS

Federal questions to be reviewed on Writ of Certiorari, were first raised in the Circuit Court of the City of Richmond, Virginia pursuant to it's Order dated March 5, 1992 [Order, Appendix, p. 6], when on March 11, 1992, Defendants filed their Motion to Set Aside the Order of February 12, 1992; and the federal questions were preserved on Appeal in the Supreme Court of Virginia, by Assignments of Error. [See, Virginia Petition for Writ of Error and Supersedeas, Assignments of Error; and Virginia Petition for Rehearing]

REASONS FOR GRANTING PETITION

A review on Certiorari is necessary to prevent National and State Banks, and the Banking Industry from unconstitutionally exploiting the general population of the United States, where a banking institution entraps borrowers into disadvantaged financial transactions for the exclusive purpose of profitteering.

A review on Certiorari is necessary to prevent a state court from unconstitutionally abusing the use of the legal principle of Demurrer; to reject cases, where pleadings are adequate to state a cause of action.

A review on Certiorari is necessary to prevent a state court from unconstitutionally abusing the legal principle of the Doctrine of Laches; to reject cases, where pleadings are adequate to state a cause of action.

A review on Certiorari is necessary to prevent a state court from unconstitutionally abusing the legal principle of Summary Judgement; to reject cases, where pleadings are adequate to state a cause of action.

I. DID THE COURT'S SUSTAINING OF THE PLAINTIFF'S DEMURRER, CONSTITUTE REVERSIBLE ERROR AND PREJUDICE THE RIGHTS OF THE DEFENDANTS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Instead of considering Plaintiff's Demurrer first, the Circuit Court prematurely ruled on Plaintiff's Plea to the Statute of Limitations, with the result that the Court disposed of all Defendants claims and damages existing prior to January 4, 1989.

Even with such treatment, the Circuit Court cannot not eliminate FACTS that existed before January 4, 1989, which are applicable to the Defendant's cause of action existing after January 4, 1989 (one year prior to filing suit on January 4, 1990).

The Circuit Court committed reversible error when it sustained Plaintiff's Demurrer on the facts alleged in the Defendants pleadings, since the Defendants relied upon the said "commitment" after January 4, 1989, with the result that the Defendants were

damaged on a continuing basis whenever they made curtailments and payments of interest to Plaintiff Bank after January 4, 1989.

On Demurrer, the trial Court may only look to the four corners of the Defendant's Equitable Defense and Counterclaim for the facts that it can consider, and the Supreme Court of Virginia (and the Supreme Court of the United States) must accept those facts as true for the purposes of a Demurrer. (See, FACTS)

The Supreme Court of Virginia (and the Supreme Court of the United States) must accept the fact that the Note of March 9, 1987 evidenced the "commitment", since it was the last of the approximately 18 notes which evidenced the continuing transaction between the parties, and the said Note is the instrument upon which the Plaintiff bases its claim against the Defendants.

And, although Plaintiff denies the existence of any commitment to the Defendants, upon consideration of the Defendants' pleadings relating to October, 1989 (after

January 4, 1989), the Court must accept the alleged "commitment" as a fact, along with its terms and conditions, as well as, the allegation that Plaintiff agreed to honor the said "commitment" during March, 1984.

It should be noted that Defendants claim includes as damages after January 4, 1989, any amount to which the Plaintiff might be entitled on the Note of March 9, 1987, since the Defendants had not incurred those damages at the time that they filed their equitable defense and counterclaims.

The Supreme Court of Appeals of Virginia, in Matney, et al. v. Yates 121 Va. 506, 93 S.E. 694, (1917), stated the principle which is to be applied on appellate review of a demurrer, namely, where a matter is admitted by demurrer, it must be regarded as a fact, in a light most favorable to the party opposing the demurrer.

The Virginia Supreme Court has held that "[a]n action for fraudulent inducement need not ... be limited to formation of the contact." Ware v. Scott, 220 Va. 317, 320,

257 S.E.2d 855, 857 (1979).

The Defendants' claims have been well plead and are proper questions of fact for a jury to decide. All of the elements of actual fraud, constructive fraud, and other equitable relief have been alleged in the Defendants pleadings, to-wit: 1) Plaintiff made "false representations", 2) of material facts, 3) intentionally and knowingly made by the Plaintiff, 4) with the intention to mislead the Defendants, and 5) it was relied upon by the Defendants, 6) resulting in damage to the Defendants.

The issue before this Court is the Plaintiff's fraudulent intent and conduct which deceived and damaged the Defendants [as Actual Fraud, see: Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928); Boykin v. Hermitage Realty, 234 Va. 26, 360 S.E.2d 177 (1987); Colonial Ford Truck Sales, Inc. v. Schneider, 228 Va. 671, 325 S.E.2d 91 (1985) sustained Demurrer, reversed].

And the Plaintiff concealed from the Defendants, it's true intention not to fund

the Defendants' computer activities. [as Actionable Fraud, see: Allen Realty Corp. v. Holbert, 227 Va. 441, 318 S.E.2d 592 (1984); Clay v. Butler, 132 Va. 464, 112 S.E.2d 697 (1922)].

The Defendants submit that in the alternative, by the use of the words willful, wrongful, and reckless they have sufficiently plead Constructive Fraud against the Plaintiff Bank. [as Constructive Fraud, see: Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 881, 148 S.E. 785, 788 (1929); Bergmueller v. Minnick, 238 Va. 332, 383 S.E.2d 722 (1989); Union Trust Corp. v. Fugate, 172 Va. 82, 200 S.E. 624 (1939); Packard Norfolk, Inc. v. Miller, 198 Va. 557, 95 S.E.2d 207 (1956); Nationwide Ins. Co. v. Patterson, 229 Va. 627, 331 S.E.2d 490 (1985).]

In Trust Co. of Norfolk v. Fletcher, the Virginia Supreme Court drew the distinction between actual and constructive fraud when it found:

> Whether the misrepresentation is made innocently, or knowingly, if acted on, the effect is the same. In the one case

> the fraud is actual; in the other, it is constructive. Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 881, 148 S.E. 785, 788 (1929).

And the Defendants submit that in the alternative, they have sufficiently alleged the elements for equitable relief against the Plaintiff Bank, in that if a jury were to find that Plaintiff's conduct was of such a nature that the RESULT of the said "continuing commercial transaction" would shock the conscience of a reasonable man, then Defendants would be entitled to equitable relief. [as Equitable Relief, see: Bell v. Smith ___ Fla. ___, 32 So. 2nd 829 (1947); Thomas v. Jones, 98 Va. 323, 36 S.E. 382; Derby v. Derby, ___ Va. App. ___, 378 S.E.2d 74 (1989)]

A Virginia Court of Equity may, in every case, remedy any injustice perpetrated by the fraudulent or inequitable conduct of a wrongdoer, and a Court of Equity is empowered to look behind any instrument to see the fraud, without setting the instrument aside or adjudicating the instrument to be invalid in

whole, whether it be a will, deed, contract, or any other instrument lawfully made.

The Defendants submit that their pleadings sufficiently allege a cause of action, based upon the Plaintiff's fraudulent conduct coupled with the present intention not to perform. A long and well established principle of Virginia law, found by the Supreme Court of Virginia in Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928)

The elements necessary to establish a cause of action in Virginia are well plead by the Defendant's Equitable Defense of Fraud and Counterclaims. The elements which entitle the Plaintiff's to equitable relief, simply stated are (1) A false representation; (2) Of a material fact; (3) Made intentionally and knowingly; (4) With intent to mislead; (5) Reliance by the party mislead; (6) Resulting in damage to the misled party. See, Elliott v. Shore Stop, Inc., 238 Va. 237, 384 S.E.2d 752 (1989); Winn v. Aleda Constr. Co., 227 Va. 304, 315 S.E.2d 193 (1984)

The Defendants submit that the fact of

the Plaintiff's concealment of it's fraudulent conduct and failure to disclose it to the Defendants, was well plead as alleged in the Defendant's pleadings, and should have been accepted as admitted to be true for the purposes of demurrer. [See: J & D Masonry, Inc. v. Kornegay, 224 Va. 292, 295 S.E.2d 887 (1982); Saunders v. General Servs. Corp., 659 F. Supp. 1042 (E.D. Va. 1986)]

Rule 1:8 of the Supreme Court of Virginia states "... Leave to amend shall be liberally granted in furtherance of the ends of justice. ...", and Defendants were prejudiced by the Trial Court when it denied the Defendants an opportunity to amend their pleadings, as is usually liberally afforded to any party. See, Bentz v. Bentz, 2 Va. App. 486, 345 S.E.2d 773 (1986)

For the reasons stated above, your Petitioners have been denied their Rights guaranteed to them the by Fourteenth Amendment to the United States Constitution, and a Writ of Certiorari should be granted.

II. DID THE COURT'S SUSTAINING THE PLAINTIFF'S PLEA OF THE STATUTE OF LIMITATIONS AND LACHES, CONSTITUTE REVERSIBLE ERROR AND PREJUDICE THE RIGHTS OF THE DEFENDANTS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Doctrine of Laches is the appropriate principle for limitation of actions, since the tort of Fraud sounds in Equity, and the Trial Court has improperly applied a one-year Statute of Limitations, instead of Laches in this case. However, considered in the light most favorable to the Defendants, the Statute of Limitations does not bar the Defendants claim.

Since no facts have been admitted into evidence in this case, by way of testimony or exhibit, the case has not matured to the stage that the Court can rule upon the Plaintiff's Plea to the Statute of Limitations and Laches without taking testimony where the record shows that material facts are genuinely in dispute respecting when the plaintiff discovered, or by the exercise of due

diligence should have discovered the alleged fraud. The trial court erred in summarily dismissing the fraud count since "... questions of due diligence in discovering fraud must be left to the Jury." Brumbrey, 665 F.Supp. at 1202; Gilmore v. Basic Industries, Inc., 233 Va. 485, 357 S.E.2d 514, (1987).

In this case, the Statute of Limitations or Laches began to run at the time that the Plaintiff made it's Call on October 3, 1989, since a Statute of Limitations and Doctrine of Laches begins to run when the right of action accrues and not from the mere date of some instrument. [See: Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc., 221 Va. 81, 266 S.E.2d 887].

The Defendants right to sue the Plaintiff did not accrue until the Bank made it's Call, by letter of October 3, 1989. See, Mears v. Accomac Banking Co., Inc., 160 Va. 311, ___ S.E.2d ___ (1933). As a result the Statute of Limitations and Laches could not begin to run on the Defendants claim against the Plaintiff until October 3, 1989.

During the Hearing on February 6, 1992, the Court erred when it denied the Defendant's oral Motion to consider the facts shown by the Admissions, Discovery Depositions and Documents Produced, and to make them part of the record for the purpose of ruling upon the Statute of Limitations and of Laches.

Also the Court erred when it failed to rule that the Statute of Limitations and Laches had been tolled by the Plaintiff's fraudulent concealment, actions and conduct, when the Court failed to give proper consideration to the facts that the Plaintiff had concealed it's true intention from the Defendants.

The Virginia Supreme Court has held that "[c]oncealment of a material fact by one who knows that the other party is acting upon the assumption that the fact does not exist constitutes actionable fraud." [See: Allen Realty Corp v. Holbert, 227 Va. 441, 450, 318 S.E.2d 592, 597 (1984); Clay v. Butler, 132 Va. 464, 474, 112 S.E. 697, 700 (1922)]

In Richmond Redevelopment and Housing

Auth. v. Laburnum Construction Corp., 195 Va. 827, 80 S.E.2d 574 (1954) overruled on other grounds, and Keepe v. Shell Oil Co., 220 Va 587, 260 S.E.2d 722 (1979), the Virginia Supreme Court held that the running of the statute of limitations can also be tolled by efforts on the party guilty of fraud to conceal that fraud. However, "[t]he character of the fraud necessary to toll the statute must be of a variety involving moral turpitude. A defendant must intend to conceal the discovery of the cause of action by trick or artifice and must have thus actually concealed it from the plaintiff in order for the exception to apply."

[Also see, J & D Masonry, Inc. v. Kornegay, 224 Va. 292, 295 S.E.2d 887 (1982); Saunders v. General Servs. Corp., 659 F. Supp. 1042 (E.D. Va. 1986); Midland-Ross Co. v. Adamon Co., 6 Va. Cir. 512, 514 (City of Richmond, 1977); Marotot v. Weddle, 6 Va. Cir. 360, 361 (City of Virginia Beach, 1986)].

The Defendants conducted all their banking business and activities concerning the

continuing loan transaction which is the subject matter of this appeal, at the Allen Avenue location with the Bank's branch managers (Drake, Irby, and McClintic) from 1983 until approximately January of 1988.

From the onset, the Bank (Drake) had a present intention not to perform on the "commitment" as shown by Bank's (Drake) memorandum. [Defendants Exhibit 2, 7/5/93]. The Bank (Drake) never informed the Defendants of the existence of the Bank's (Drake) memorandum [Defendants Exhibit 2, 7/5/83] until after suit was filed in 1990, when the Bank produced documents pursuant to discovery, in December, 1991.

Contemporaneous with, and pursuant to the Bank's secret directive, the Bank (McClintic) fraudulently induced the Defendants into executing the demand Note of March 9, 1987, by representing that a demand note would save the bank paper work, save the Defendants the inconvenience of having to execute a renewal note every 90 days, and that it along with regular curtailments over a 10

year period would facilitate loans to the Defendants in the future [Defendants Exhibit 16].

The Bank (McClintic) did not advise the Defendants of the Bank's (Tyler) secret directives [Defendants Exhibit 13, 2/25/87], and the Bank did not disclose the secret directive to the Defendants until after suit was filed, when the Bank produced documents pursuant to discovery, in October, 1990.

After the Bank (Drake) agreed to honor it's commitment to the Defendants in March, 1984, the Bank never advised or disclosed to the Defendants that Bank would not lend any additional funds to the Defendants pursuant to the "commitment". The Plaintiff Bank's letter of October 3, 1989 completed the Bank's fraudulent scheme and constitutes a landmark in this case because it is the first time that the Bank clearly displayed it's fraudulent intention to the Defendants.

During discovery in this case, each of the Bank's loan officers testified during discovery that the Bank (Drake, page 43)

probably would have loaned the funds or that the Bank (Irby, page 63; McClintic, page 24; and Tyler, page 81) had NEVER advised or informed the Defendants that the Bank would not lend any additional funds to the Defendants pursuant to the "commitment".

While there was substantial activity with the Bank, the Defendants NEVER had any reason not to trust, not to believe, or not to rely upon the Bank's representations, before the Bank made Call on October 3, 1989.

The Plaintiff's fraud was obscured from the Defendants by the substantial activity between the parties, which included misrepresentations by the bank, new loans by the bank, approximately eighteen note renewals with interest payments, changing the note that evidenced the obligation from a 90 day note to a demand status (McClintic), approximately 30 monthly curtailments, attempted curtailment schedule changes (Drake, Irby, McClintic, and Tyler), and harassment of the Defendant by the Bank (Tyler) from 1988, until October, 1989.

For the reasons stated above, your

Petitioners have been denied their Rights guaranteed to them the by Fourteenth Amendment to the United States Constitution, and a Writ of Certiorari should be granted.

III. DID THE COURT'S GRANTING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT AND DISMISSING THE DEFENDANTS' EQUITABLE DEFENSE OF FRAUD AND COUNTERCLAIMS, CONSTITUTE REVERSIBLE ERROR AND PREJUDICE THE RIGHTS OF THE DEFENDANTS IN VIOLATION OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED BY ARTICLE I, SECTION 11 OF THE CONSTITUTION OF VIRGINIA AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Circuit Court committed reversible error by it's Order entered February 12, 1992, wherein it granted summary judgement against the Defendants.

The Circuit Court improperly considered the Plaintiff's Motion for Summary Judgement, after having sustained the Plaintiff's Demurrer, without first having allowed the Defendants the opportunity to amend their pleadings.

In this case the pleadings alleged a cause of action and sufficiently appraised the other party of what he was required to answer,

and the other party had denied the material allegations of fact, the parties were at issue and a motion for summary judgement should not prevail. See, Goode v. Courtney, 200 Va. 804, 108 S.E.2d 396 (1959).

Also in this case there remained material facts generally in dispute after discovery depositions, it was error for the trial court to enter summary judgement. Owens v. Redd, 215 Va. 13, 205 S.E.2d 669 (1974).

There are many material facts genuinely in dispute in this case, since the Plaintiff by it's pleadings denies that the Bank ever made any commitment to the Defendants (as shown by the Pleadings, Answers, and Admissions).

The Virginia Supreme Court has held that the "Present intent not to perform" represents an exception to the general rule that fraud cannot usually be predicated on promises to do something in the future. In Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928) the Supreme Court noted that:

It has been stated that the gist of

> fraud in such case is not the breach of the agreement to perform, but the fraudulent intent. ... some courts have held that the fraudulent purposes of the promisor and his false representation of an existing intention to perform, when such an intent did not exist, is the misrepresentation of a fact. (Citation omitted) ...

Also see, Boykin v. Hermitage Realty, 234 Va. 26, 29, 360 S.E.2d 177, 178-79 (1987).

In this case the record shows that material facts are genuinely in dispute respecting when the plaintiff discovered, or by the exercise of due diligence should have discovered the alleged fraud, the trial court erred in summarily dismissing the fraud count. Gilmore v. Basic Industries, Inc., 233 Va. 485, 357 S.E.2d 514 (1987).

The Court should view all the facts in a light most favorable to the party opposing the Motion for Summary Judgement, as are shown by the pleadings, answers, responses, depositions, testimony, exhibits, and other evidence before it, and when there is a conflict in the facts shown by the evidence the Court is without authority to enter a

Summary Judgement.

All the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his right to liberty or property. See, Ward Lumber Co. v. Henderson -White Mfg. Co., 107 Va. 626, 59 S.E. 476 (1907); Commission of Fisheries v. Hampton Rds. Oyster Packers & Planters Ass'n, 109 Va. 565, 64 S.E. 1041 (1909); Graham v. Mitchell, 529 F.Supp. 622 (E.D. Va. 1982).

For the reasons stated above, your Petitioners have been denied their Rights guaranteed to them by the Fourteenth Amendment to the United States Constitution, and a Writ of Certiorari should be granted.

CONCLUSION

The Trial Court's sustaining the Plaintiff's Demurrer and Dismissing the Defendants' cause; sustaining the Plaintiff's Plea to the Statute of Limitations and Laches; and granting the Plaintiff's Motion for Summary Judgement; and the Virginia Supreme Court's denial of the Petition for Writ of error; constituted reversible error and denied the Defendants' Rights of Due Process of Law, and Equal Protection of the Law as guaranteed by Article I, Section 11 of the Constitution of Virginia, and the Fourteenth Amendment to the Constitution of the United States.

Your Petitioners, Computer Heaven, Inc. and Robert W. Dervishian, respectfully pray that a Writ of Certiorari be granted for direct appeal of Final Order of the Supreme Court of Virginia entered September 18, 1992, and other Orders entered by the Circuit Court of the City of Richmond, Virginia on February 12, 1992; and that all the said Orders be reversed; and that your Petitioners case be remanded to the Circuit Court of the City of

Richmond, Virginia for further proceeding.

Respectfully submitted,

COMPUTER HEAVEN, INC.,

By _____

ROBERT W. DERVISHIAN

_____

_____

Robert W. Dervishian, Esquire, Pro Se
600 N. Boulevard
Richmond, Virginia 23220
(804) 355-2121
Counsel for Petitioners

Circuit Court

of the

City of Richmond

John Marshall Courts Building

February 12, 1992

Jeffrey A. Oppleman, Esq.
Zwerdling, Oppleman and Paciocco
The Corporate Centre
5020 Monument Avenue
Richmond, VA 23230

Robert W. Dervishian, Esq.
600 North Boulevard
Richmond, VA 23220

Gentlemen:

Re: Case No. LS-36-3 Crestar Bank v. Computer Heaven, Inc., et al.

Defendants claim a defense to plaintiff's action on a note, the equitable plea of fraud (See Va. Code Ann. 8.01-422). They also asset the alleged fraud as a counterclaim for actual and punitive damages.

Defendants base their claim of fraud upon the allegations that from as early as 1984 and continuing several times thereafter until October, 1989, plaintiff's agents promised to make loans to fund a computer business, knowing that such loans would not be

made. Relying on these representations, defendants made bank deposits with plaintiff, established the business and received loans up to $10,000.00, when plaintiff refused to loan more money. I will refer to this as Transaction 1.

Defendants claim that several months later, plaintiff again promised to loan the funds without any intent to do so causing defendants to pay on the loan already made, to borrow more money and to continue the business operation (Transaction 2).

In Transaction 3 a new loan officer allegedly also made false representations of intent to make loans to fund the business and that he harassed them to make increased curtailment payments which the defendants say caused them to increase payments.

Transaction 4 is based upon defendant's assertions that in October, 1989, a default was fraudulently declared with the intention

of switching the nature of the loan.

Finally, defendants claim all of the above were parts of a scheme to "entrap" defendants into a disadvantaged financial transaction for profiting the plaintiff and with no intention of funding the defendants.

Plaintiff demurred, pled the statute of limitations and laches. Defendants say that the pleas of the statute of limitations and laches are without evidence and cannot be acted upon.

The court is of the opinion that the one-year statute of limitations for fraud is applicable. The cause of action accrued and the statute of limitations began to run when the defendants knew, or with due diligence should have know, of the fraud. Va. Code Ann. 8.01-249(1). This action was filed January 4, 1990.

From defendants' pleading and representations in court, Transactions 1, 2, and 3 occurred between 1985 and 1988. In each instance plaintiff's fraudulent intent; i.e. its intent not to make loans as promised,

became known to defendants, as they allege, when it refused to make further loans. As pled, these facts are asserted by the defendants and cannot be in dispute by them. As each of these facts supporting the defendants' claims, including their knowledge of the alleged misrepresentation, occurred more than one year before January 4, 1990, Transactions 1, 2 and 3 are time barred. Any claim based on misrepresentations and refusals to loan occurring before 1989 is time barred.

Transaction 4 is not time barred, but as also applicable to Transactions 2 and 3, the only change of position caused by the misrepresentations was their curtailment of the note and receipt of additional monies.

As defendants were obligated to curtail the loans previously made, such payments cannot form the basis of a detrimental reliance to support a fraud claim. One has not suffered a detriment by repaying an obligation. Except for the receipt of new loans as the result of alleged

misrepresentations in 1989, the court cannot discern from the pleadings any other detrimental reliance that was caused by the

fraudulent representations of the plaintiff. It is not clear to the court that the receipt of loans can be a detriment. Counsel never argued this point, accordingly a ruling cannot be made. What is left then is whether a misrepresentation of an intent to make loans to a certain level and on certain terms with no intent to actually live up to that commitment can be the basis of a fraud claim where the defendants prove that in reliance on the misrepresentations they made loans but not to the extent anticipated. The demurrer is sustained only to the extent noted on the allegations relating to October, 1989.

The court is of the opinion that plaintiff's plea of the statute of limitations and laches should be sustained as to all facts occurring prior to 1989. No action is taken

on the demurrer, except as noted above.

Copies of an order implementing this opinion are enclosed.

Sincerely yours,

/s/ T. J. Markow

VIRGINIA:

In the Circuit Court of the City of Richmond, John Marshall Courts Building the TWELFTH day of FEBRUARY 1992

CRESTAR BANK, SUCCESSOR IN INTEREST TO UNITED VIRGINIA BANK, Plaintiff

vs. Case No: LS-36-3

COMPUTER HEAVEN, INC., and ROBERT W. DERVISHIAN, Defendants

ORDER

This day came the parties on the plaintiff's demurrer and its plea to the statute of limitations and laches to the Special Plea of Equitable Defense, to the Counterclaim and motions for summary judgement, and argument was heard.

For reasons stated in the court's letter opinion to counsel, it is ORDERED that the demurrer, plea of the statute of limitations and laches are sustained and plaintiff is granted summary judgment against both defendants on the counterclaim which is based on facts occurring befor 1989.

The objections of the defendants are noted.

Copies of this order were this day

mailed to counsel of record.

ENTER 2/12/92

/S/ T. J. Markow
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND

CRESTAR BANK, Successor in
Interest to United Virginia Bank, Plaintiff

vs. Case No: LS-36-3

COMPUTER HEAVEN, INC.

and

ROBERT W. DERVISHIAN, Defendants

ORDER

Came this day the parties, individually and by counsel, and pursuant to the defendants' Counterclaim and special plea of equitable defense, to which the plaintiff filed a Demurrer, a plea of the statute of limitations, latches and a Motion for Summary Judgement, said hearing occurred in front of the Honorable Judge T. J. Markow on February 6, 1992. Pursuant to said hearing, the Honorable T. J. Markow, pursuant to a letter opinion dated February 12, 1992, and an Order of the same date, the plaintiff's Demurrer, its plea of the statute of limitations and its plea to latches were sustained, and the plaintiff was granted Summary Judgement

against both defendants on the Counterclaim and on the special plea of equitable defense to which the defendant objected and noted their exceptions thereto. That on March 3, 1992, pursuant to additional motions filed by the defendant, to which the plaintiff responded, the court further reiterated the Order of February 12, 1992 granting Summary Judgement to the plaintiff on the defendants' Counterclaim and special plea of equitable defense, and granted the Motion In Limine previously filed by the plaintiff at which time the defendant noted their objections and exceptions and pursuant thereto, advised the court that a jury would not be necessary to be empaneled for the trial on March 5, 1992.

The parties agree that the case has matured for appeal of the judge's Order of February 12, 1992 and his oral Order of March 3, 1992, and by agreement of counsel the record for purposes of appeal will include all the Admissions, Documents Produced and transcripts of discovery depositions as may appear appropriate to each of the parties of

this suit for purposes of said appeal; and the defendants may file such Motion to set aside the Order of February 12, 1992 for purposes of preserving the record of appeal.

That the plaintiff and the defendants move this court to allow the plaintiff's claim, based upon its Motion for Judgement, to remain on the court's docket pending the appeal by the defendants of the court's rulings granting summary judgement to the plaintiff on the defendant's Counterclaim and special plea of equitable defense. That the parties acknowledge that the Counterclaim and special plea of equitable defense are causes of action which were independently raised in response to the plaintiff's Motion for Judgement, now deemed for purposes of the defendants' appeal, to be matters with independent viability as suits in their own right.

Accordingly, it is hereby ORDERED that the plaintiff's claim, based upon its Motion for Judgement, remain on the court's docket pending the appeal of the defendants' to the

court's granting of summary judgement on the Counterclaim and the special plea of equitable defense, and it is further ORDERED that Admissions, discovery documents produced, discovery depositions and transcripts of any hearings in this court be made part of the record for purposes of the defendants appeal.

And it is further ORDERED that no appeal bond shall be required on any appeal.

ENTER: 3/5/92

/s/ Judge

We Ask For This:

/s/ Jeffery A. Oppleman, p.q.

Jeffery A. Oppleman
Zwerdling, Oppleman & Paciocco
5020 Monument Avenue
Richmond, VA 23230

/s/ Robert W. Dervishian

Robert W. Dervishian, Esq., p.d.
Defendants Counsel

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 4th day of August, 1992.

Computer Heaven, Inc., et al., Appellants

against Record No. 920726
Circuit Court No. LS-36-3

Crestar Bank, Successor in Interest to United Virginia Bank, Appellee

From the Circuit Court of the City of Richmond

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgement complained of. Accordingly, the Court refuses the petition for appeal.

Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 18th day of September, 1992

Computer Heaven, Inc., et al., Appellants

against Record No. 920726
Circuit Court No. LS-36-3

Crestar Bank, Successor in Interest to United Virginia Bank, Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgement rendered herein on the 4th day of August, 1992 and grant a rehearing thereof, the prayer of the said petition is denied.

Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 22nd day of October, 1992

Computer Heaven, Inc., et al., Appellants

against Record No. 920726
Circuit Court No. LS-36-3

Crestar Bank, Successor in Interest to United Virginia Bank, Appellee

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellants, in proper person, it is ordered that issuance of the mandate in this case be and the same hereby is deferred, to and including the 17th day of December, 1992, on the expiration of which time the same may issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that court.

Judge